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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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March 4, 1996

Building The Wireless Future™

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

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Cellular
Telecommunications
Industry Association
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Re: *Ex Parte* Presentation
CC Docket 95-185
CC Docket 94-54

Dear Mr. Caton:

On Friday, March 1, 1996, the Cellular Telecommunications Industry Association ("CTIA") provided a tutorial concering the FCC's jurisdiction over LEC-CMRS interconnection. Attached is a list of FCC staff and representatives from CTIA member companies that attended the meeting:

The attached documents were presented at the tutorial. Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter along with the attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Andrea D. Williams

Andrea D. Williams
Staff Counsel

Attachments

No. of Copies rec'd 0+1
List ABCDE

FCC (in alphabetical order)
Rosalind Allen
Rudy Baca
Jim Coltharp
David Ellen
Kathy Franco
Lisa Gelb
Dan Grosh
Mike Hamra
Aliza Katz
Kathryn O'Brien
Leslie Selzer
Todd F. Silbergeld
Walter Strack
Peter Tenhula
Suzanne Tetreault
Michael Wack
Steve Weingarten

Representatives from CTIA Member Companies (in alphabetical order)
Michael Altschul/CITA
JoAnne Basile/CTIA
Jonathan Chambers/Sprint Spectrum
Dan Cohen/Arter & Haden
Randall Coleman/CTIA
Jennifer Donaldson/Willkie Farr & Gallagher
Brian Fontes/CTIA
Laura Holloway/Nextel
Leonard Kennedy/Dow, Lohnes & Albertson
Ed Krachmer/CTIA
Lawrence Krevor/Nextel
Alex Netchvolodoff/Cox Enterprises
Laura Phillips/Dow, Lohnes & Albertson
Tim Rich/CTIA
Howard Simons/Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
Jimmy Vaughan, CTIA
Philip Verveer/Willkie Farr & Gallagher
Andrea Williams/CTIA
Alexandra Wilson/Cox Enterprises

1996 TELECOM ACT DOES NOT AFFECT THE FCC'S JURISDICTION OVER LEC-CMRS INTERCONNECTION

Section 332(c) Establishes a Federal Framework for the Regulation of LEC-to-CMRS Interconnection, Including Interconnection Rates

With the enactment of section 332, Congress deliberately chose a federal regulatory framework to apply to all commercial mobile services. In so doing, it specifically exempted CMRS from the dual federal and state regulatory regime originally established to govern interstate and intrastate services.[1/] The Commission has acknowledged the broad nature of this statutory preemption: "Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to section 2(b)" of the Act.[2/] While section 2(b) generally deprives the Commission of authority over intrastate communications,[3/] Congress amended that provision to except mobile communications services from the general limitation on Commission authority.[4/]

This regulatory framework embodied in section 332(c) has already yielded tangible benefits, promoting the rapid expansion of wireless services by removing unnecessary regulatory constraints.[5/] Through the auction process, the marketplace has responded to the adoption of this framework by valuing PCS licenses at more than $15 billion to date.

As part of the Federal regulatory scheme for CMRS, section 332 gives the Commission plenary jurisdiction to order LEC-to-CMRS interconnection pursuant to the provisions of section 201 of the Act.[6/] LEC-to-CMRS interconnection is a Federal matter

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[1/] See 47 U.S.C. §§ 152(a)-(b).

[2/] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993) ("Budget Act House Report").

[3/] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986).

[4/] 47 U.S.C. § 152(b) (establishing that the Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332") (emphasis supplied).

[5/] In June 1993, there were approximately 13 million cellular subscribers. There are currently about 32 million subscribers, an increase of 150 percent.

[6/] Id. at § 332(c)(1)(B).

governed by Federal law and administered by the Commission.[7/] Of necessity, this grant of plenary authority over interconnection and CMRS rates carries with it jurisdiction over the rates LECs charge wireless providers for interconnection. The Commission itself has determined that section 2(b), as amended, and section 332(c) establish Federal jurisdiction over all CMRS rates, including the rates charged for interconnection.[8/] This conclusion flows logically from the statute itself. The 1993 Budget Act amended section 2(b) to remove the bar on Federal regulation of "charges . . . in connection with intrastate communication service . . . by radio." Thus, it is not the case that the FCC's authority over CMRS rates is limited to end user charges.

State regulation of LEC-to-CMRS interconnection rates is fundamentally inconsistent with the statutory goal of a nationwide CMRS market where the rapid deployment of wireless technology is encouraged.[9/] This is especially true in the case of PCS, which will operate in geographic areas that cross numerous state boundaries. Even if it were possible to segregate interstate and intrastate traffic, requiring a PCS provider to comply with several state compensation arrangements for a single set of facilities is directly contrary to the purposes of the section 332. Cellular networks likewise have evolved to a point where "local" systems are now served by centralized signalling hubs that support multi-state regions. With CMRS providers increasingly utilizing such regional architecture, compliance with multiple,

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[7/] See Budget Act House Report at 261 ("The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.")

[8/] CMRS Second Report, 9 FCC Rcd at 1499-1500, 1506-1507; In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, FCC 94-145 (rel. July 1, 1994), at ¶ 143 ("Equal Access Notice") ("With respect to state jurisdiction over the intrastate rates charged by CMRS providers, the CMRS Second Report determined that the Budget Act preempt any state regulation of CMRS interconnection rates.").

[9/] Cf. Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409, 422-425 (1985) (state order regulating purchase of natural gas by pipeline provider was preempted by federal statute because it undermined Congress's determination that supply, demand, and price be determined by market forces and disturbed the uniformity of comprehensive federal regulatory scheme).

inconsistent rate structures for interconnection would be unnecessarily complex and burdensome.[10/]

To the extent states permit LECs to charge discriminatory rates or deny mutual compensation treatment to CMRS providers, moreover, state involvement in interconnection issues amounts to prohibited entry regulation.[11/] Excessive charges for monopoly interconnection facilities may drive out existing competitors to LEC wireless companies or discourage potential new entrants. Likewise, state efforts to retain the traditional one-way payment of interconnection charges by CMRS providers to LECs would frustrate any bill and keep mechanism that the Commission adopts in this proceeding: because it would be impossible to separate the costs of interstate and intrastate interconnection, a state-imposed access charge regime would effectively force CMRS providers to "double pay" for LEC-supplied termination services for which the LECs were being compensated through bill and keep.

The Enactment of the Telecommunications Act of 1996 Does Not Affect the FCC's Authority Over LEC-to-CMRS Interconnection

The Telecommunications Act of 1996 ("1996 Act")[12/] does not alter the Commission's plenary authority over LEC-to-CMRS interconnection, including the structure and level of interconnection rates. Rather, the 1996 Act establishes a complementary regulatory framework within which telecommunications carriers can obtain interconnection, access to network elements, and resale capacity to provide telephone exchange service or

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[10/] The inseverability of interconnection rates into are inseverable into discrete interstate and intrastate components would support plenary Federal jurisdiction over these matters even under a traditional section 2(b) analysis.

[11/] 47 U.S.C. § 332(c)(3). The Commission has held that entry regulation includes not only direct bans on entry, but also the imposition of terms and conditions that would have the effect of impeding or frustrating the provision of service. See Preemption of State Entry Regulation in the Public Land Mobile Service, Report and Order, 59 RR 2d 1518 (1986) ("PLMS Order"), rev'd on other grounds, National Association of Regulatory Utility Commissioners v. Federal Communications Commission, slip op. No. 86-1205, 1987 U.S. App. LEXIS 17810 (D.C. Cir. March 30, 1987), remand, Preemption of State Entry Regulation in the Public Land Mobile Service, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987). The PLMS Order was reversed because the court found that the Commission did not have the jurisdiction to preempt State regulation of intrastate communications. The enactment of section 332(c)(3) removes this impediment.

[12/] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

exchange access.[13/] While the new framework also includes a set of pricing standards -- to be developed by the Commission[14/] and enforced by the states -- these standards are applicable only to interconnection, network elements, transport and termination, and resale obtained pursuant to the "competitive checklists" established by the new law.[15/] The requirements of the 1996 Act are not intended as the sole means for obtaining interconnection with a local exchange carrier.

In particular, the 1996 Act does not amend section 332(c)(1)(B) and, in the same section in which it establishes the new regulatory framework under sections 251 and 252, explicitly leaves intact the Commission's authority to order interconnection under section 201 of the Communications Act.[16/] These are the sources of the Commission's authority over LEC-to-CMRS interconnection, including the rates for interconnection. By preserving these provisions, Congress clearly intended that they coexist with the requirements of new sections

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[13/] 47 U.S.C. § 251.

[14/] The FCC clearly has jurisdiction to develop these pricing standards. Section 251(d)(1) requires the Commission to "complete all actions necessary to establish regulations to implement the requirements of [section 251]." 47 U.S.C. § 251(d). These requirements include "just, reasonable, and nondiscriminatory" rates for interconnection and network access and "reciprocal compensation arrangements for the transport and termination of telecommunications. See 47 U.S.C. § 251(c)(2)(D), (3); id. § 251(b)(5). The pricing standards established in section 252(d) elaborate these requirements, but they remain the Commission's responsibility to implement. To conclude otherwise would empower the State to adopt pricing standards that are inconsistent with or that frustrate the goals of section 251. Indeed, the FCC is empowered to "preclude" State regulations that are not consistent with the requirements of section 251 or that "substantially prevent implementation" of those requirements. 47 U.S.C. § 251(d)(3).

[15/] 47 U.S.C. § 252(d)(1) (pricing standard for interconnection and network elements is established "for purposes of subsection (c)(2) of section 251" and "for purposes of subsection (c)(3) of such section," respectively); id. § 252(d)(2) (pricing standard for transport and termination is established "for purposes of compliance . . . with section 251(b)(5) (emphasis supplied).

[16/] 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.").

251 and 252.[17/] Nothing in the statutory language or legislative history of the 1996 Act suggests any design by Congress to force LEC-to-CMRS interconnection matters into the new framework established under sections 251 and 252.

More generally, the 1996 Act makes clear that Congress was satisfied with the successful regulatory framework for CMRS that had been adopted in the 1993 Budget Act and did not intend for the new statute to alter that framework.[18/] In addition to maintaining the Commission's pre-existing authority over CMRS interconnection matters, Congress excluded providers of CMRS from the definition of "local exchange carrier"[19/] and specifically preserved the preemption provisions of section 332(c).[20/] Where Congress intended to modify the 1993 Budget Act's regulatory framework for CMRS, it did so explicitly.[21/]

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[17/] See H.R. Rep. No. 458, 104th Cong., 2d Sess. 123 (1996) ("New section 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority to order interconnection under section 201 of the Communications Act.") (emphasis added).

[18/] As Representative Fields observed when Congress began consideration of the legislation that ultimately became the 1996 Act:

> Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless telecommunications services built on the same concepts contained in H.R. 3636. Today we will take the next step in the process of crafting a national telecommunications policy as we turn our attention to other sectors of the telecommunications industry.

U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Telecommunications and Finance, Hearings on H.R. 3636 (January 27, 1994).

[19/] 1996 Act, § 3(a), adding new section 3(44).

[20/] Id. § 101(a), adding new section 253(e).

[21/] See id. § 401, adding new section 10 (expressly broadening the Commission's forbearance authority with respect to CMRS providers).

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February 28, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006
STOP CODE: 1170

Re: Ex Parte Communication in CC Docket No. 95-185

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, notice is hereby given of the attached written *ex parte* communication filed on behalf of Cox Enterprises, Inc., for incorporation into the record in the above-referenced proceedings.

The *ex parte* memorandum addresses Commission jurisdiction over commercial mobile radio services ("CMRS") and interconnection between local exchange carriers ("LECs") and CMRS providers pursuant to the Omnibus Budget Reconciliation Act of 1993 and the Telecommunications Act of 1996. The *ex parte* memorandum also responds to an *ex parte* letter jointly filed by Bell Atlantic Corporation and Pacific Telesis Group in this proceeding. *See* Letter from Michael K. Kellogg, Attorney for Bell Atlantic and Pacific Telesis, to William F. Caton, Secretary, Federal Communications Commission, filed on February 26, 1996 in CC Docket No. 95-185.

An original and two copies of this notice and the attached paper are being filed with the Secretary's office. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Laura Phillips

Werner K. Hartenberger
Laura H. Phillips

Counsel for Cox Enterprises, Inc.

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February 28, 1996

MEMORANDUM

This memorandum analyzes the Commission's jurisdiction over rates, terms and conditions of interconnection between local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers pursuant to the Telecommunications Act of 1996 ("TCA") and the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Cox Enterprises, Inc. ("Cox") demonstrates below that the TCA preserves the Budget Act's exclusive grant of jurisdictional authority to the Commission over CMRS providers and LEC-to-CMRS interconnection. Accordingly, the Budget Act and the TCA give the Commission exclusive authority to adopt its tentative proposal to establish an interim bill-and-keep mutual compensation policy for LEC-to-CMRS interconnection in the pending *CMRS Interconnection Notice*.[1/]

I. BACKGROUND

On October 16, 1995, Cox submitted a memorandum — attached hereto — in the Commission's ongoing *CMRS Equal Access and Interconnection* docket[2/] demonstrating that the Budget Act vests the Commission with exclusive jurisdiction over CMRS providers and the rates, terms and conditions of LEC-to-CMRS interconnection.[3/] In particular, the memorandum showed that the Budget Act's amendments to Sections 2(b) and 332 of the Act "federalized" all commercial mobile radio services, thereby bringing them within the exclusive interstate jurisdiction of the Commission.[4/]

1/ *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket Nos. 95-185, 94-54 (released January 11, 1996) ("*CMRS Interconnection Notice*").

2/ *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408 (1994) ("*CMRS Equal Access and Interconnection Notice*").

3/ *See Ex Parte* Letter from Werner K. Hartenberger, Counsel for Cox Enterprises, Inc., to William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 94-54 on October 16, 1995 ("Cox *Ex Parte*").

4/ *See* Cox *Ex Parte*, at 3-9.

II. DISCUSSION

In an *ex parte* letter jointly filed on February 26, 1996, Bell Atlantic Corporation ("Bell Atlantic") and the Pacific Telesis Group ("PacTel") argue that the TCA "expressly strips the Commission of authority to mandate" bill-and-keep interconnection between LECs and CMRS providers.[5/] The Bell Atlantic/PacTel *Ex Parte*'s error-filled interpretation of the TCA would stand the statutory framework and Congressional intent on their heads. In fact, the TCA preserves the Commission's exclusive jurisdiction over LEC-to-CMRS interconnection granted by the Budget Act.

A. The Budget Act. As the Bell Atlantic/PacTel *Ex Parte* acknowledges, "[i]nterconnection between LECs and CMRS is covered by Section 332(c)(1)(B)" of the Budget Act.[6/] The Bell Atlantic/PacTel *Ex Parte* nevertheless concludes that Section 332(c)(1)(B) deprives the Commission of jurisdiction over LEC-to-CMRS interconnection. By failing to consider the entire statutory framework of the Budget Act, however, the Bell Atlantic/PacTel *Ex Parte* grossly misreads the import of Section 332(c)(1)(B) and fails to recognize, much less appreciate the significance of, the amendment to Section 2(b).[7/] Properly read in the context of the Budget Act, Sections 2(b) and 332(c)(1)(B) vest the Commission with exclusive jurisdiction over all aspects of LEC-to-CMRS interconnection.

To begin with, the Bell Atlantic/PacTel *Ex Parte* fails to address the ramifications of the Budget Act's amendment to Section 2(b). While it is true that Section 2(b) traditionally "fences off" from Commission jurisdiction and reserves to the states authority over

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5/ *See Ex Parte* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and PacTel, to William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 95-185 on February 26, 1996 ("Bell Atlantic/PacBell *Ex Parte*").

6/ *See id.*, at 5.

7/ The U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") has held that "it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975); *Greyhound Corp. v. Mt. Hood. Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375 (1979)).

"intrastate" matters,[8] Congress expressly amended Section 2(b) to except Section 332 and matters thereunder from the boundaries of state authority.[9]

The Budget Act shows that Congress delegated jurisdictional authority to the FCC with regard not only to CMRS providers but also any interconnection that CMRS providers require of any common carriers, regardless of any physically intrastate facilities or the intrastate nature of any traffic involved, and irrespective of a preemption analysis. Section 332(c)(1)(B) provides that:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

The plain meaning of the first sentence of this provision is that the FCC has authority to order *all* common carriers to establish physical interconnection with CMRS providers, upon request, and pursuant to Section 201 of the Act.[10] The second sentence of Section 332(c)(1)(B) means that the Commission's authority to order interconnection is not altered, *except when the Commission acts in response to a CMRS provider's request for interconnection.* Accordingly, it necessarily follows that the Commission's jurisdictional authority *is* altered with respect to requests from CMRS providers for interconnection.

Comparing the terms of Sections 201 and 332(c)(1)(B), moreover, it is evident that Section 332(c)(1)(B) expands rather than limits the FCC's jurisdiction over CMRS. Section 201(a) provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, . . . in cases where the Commission, after opportunity for hearing, finds such action necessary or

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8/ *See* 47 U.S.C. § 152(b); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

9/ Section 2(b), as amended, provides that: "*Except as provided in . . . [S]ection 332*, nothing in this shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]." 47 U.S.C. § 152(b) (emphasis added).

10/ Section 201 of the Act authorizes the Commission to order common carriers to provide service and to make physical interconnection available, upon request. 47 U.S.C. § 201(a).

> desirable in the public interest, to establish physical interconnections with other carriers[] . . . .[11/]

While the duty to provide interconnection under Section 201(a) extends only to those common carriers "engaged in interstate or foreign communication," Section 332(c)(1)(B) makes no distinction between interstate and intrastate common carriers, but rather, provides that "the Commission shall order *a common carrier* to establish physical connections" with CMRS providers. That, of course, is consistent with the amendment to Section 2(b), which excepts CMRS services provided pursuant to Section 332 from the statute's jurisdictional distinction between intrastate and interstate services. Furthermore, while Section 201(a) requires interstate and foreign common carriers to establish physical interconnections only with respect to "other carriers", Section 332(c)(1)(B) specifically identifies "any person providing commercial mobile service" as being within the ambit of the statute's interconnection privileges.

In contrast, the Bell Atlantic/PacTel *Ex Parte* glosses Section 332(c)(1)(B) as "simply stat[ing] that physical interconnection arrangements must be established 'pursuant to the provisions of [S]ection 201[']. . . . , [and] Section 201 has never been thought to trump state rate making authority under Section []2(b)."[12/] This assertion quite plainly misunderstands the scope of the statutory changes contained in the Budget Act. CMRS was declared an interstate service and, therefore, jurisdiction over the rates, including the rates for interconnection to this interstate service, were federalized.[13/] Accordingly, state

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11/ 47 U.S.C. § 201(a).

12/ Bell Atlantic/PacTel *Ex Parte*, at 5.

13/ Under Section 2(a), the Commission has comprehensive jurisdiction over interstate and foreign communications. *See Operator Services Providers of America*, 6 FCC Rcd 4475, 4476 n.17 (1991) ("*Operator Services of America*") (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (interstate and foreign communications are "totally entrusted to the FCC"); *Telerent Leasing Corp. et al.*, 45 F.C.C.2d 204, 217 (1974) (the Commission has "plenary and comprehensive regulatory jurisdiction over interstate and foreign communications"), *aff'd sub nom.*, *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976)). The FCC's jurisdiction over interstate and foreign communications is distinct from state authority, "Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications services may be offered." *See Operator Services of America*, 6 FCC Rcd at 4477 nn.18-19 (citing *AT&T and the Associated Bell System Cos.; Interconnection With Specialized Carriers in Furnishing Interstate and Foreign Exchange Service in Common Control Switching Arrangements*, 56 F.C.C.2d 14, 20 (1975) ("The States do not have jurisdiction over interstate communications"), *aff'd sub nom.*, *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010

ratemaking authority alleged by the Bell Atlantic/PacTel *Ex Parte* to be "untrumpable" is in fact irrelevant with regard to LEC-to-CMRS interconnection.

B. The Telecommunications Act of 1996 ("TCA"). The TCA introduces requirements for LEC provision of interconnection and establishes a new general class of common carrier entity that is entitled to interconnection called a "telecommunications carrier."[14/] Because CMRS providers generally fit the definition of "telecommunications carrier", the question arises whether the interconnection provisions of the TCA alter the Commission's exclusive jurisdiction over LEC-to-CMRS interconnection. Review of the interconnection provisions of the TCA shows, however, that the Commission's exclusive jurisdiction granted by the Budget Act over LEC-to-CMRS interconnection is left undisturbed.

Section 251 of the TCA governs LEC provision of interconnection to telecommunications carriers. In particular, Subsection 251(b)(5) imposes an obligation on all LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[15/] In addition, Section 251(c)(2) imposes a duty upon

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(1978); *AT&T v. Pub Serv. Comm'n*, 635 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate communications is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC")).

14/ "Telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services. A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite services shall be treated as common carriage. 47 U.S.C. § 153(49), TCA, at § 3. "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(51), TCA, at § 3. "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's own choosing, without change in the format or content of the information as sent and received." 47 U.S.C. § 153(48), TCA, at § 3.

15/ *See* 47 U.S.C. § 251(b)(5), TCA, at § 101. The TCA expressly excludes CMRS providers from the definition of a "local exchange carriers" subject to Section 251's interconnection obligations. Section 153(44) states that:

> The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access service. Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the

all "incumbent"[16/] LECs to provide just, reasonable and nondiscriminatory access to unbundled network elements, at any "technically feasible point within the carrier's network."[17/]

In interpreting the status of the FCC's jurisdiction under Section 251, the "savings provision" in Section 251(i) provides important statutory guidance: "Nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201."[18/] Thus, the FCC's authority to set parameters for interconnection under Section 251 is *in addition to* that it already possesses under Section 201 of the Act. The legislative history regarding Section 251(i), moreover, supports this reading:

> New subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act.[19/]

Accordingly, any authority granted the FCC under the interconnection provisions of Section 251 only amplifies the power the FCC already possessed. Because the Budget Act already gives the FCC exclusive jurisdiction to respond to requests of CMRS providers for interconnection to LEC networks under Section 201(a) of the Act, Section 251 of the TCA "in no way limits or affects" this authority.

By concluding that the TCA "expressly strips" the Commission of jurisdiction over local interconnection agreements, however, the Bell Atlantic/PacTel *Ex Parte* notably fails

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definition of such term.

47 U.S.C. § 153(44).

16/ Incumbent LECs are defined as including all traditional LECs that, upon enactment, have interstate access charge tariffs on file or are members of the National Exchange Carriers Association's ("NECA") interstate access tariff. *See* 47 U.S.C. § 251(h), TCA, at § 101. All telephone companies that participate in the distribution of carrier common line ("CCL") revenue requirement, pay long term support to NECA common line tariff participants, or receive payments from the transitional support fund administered by NECA are deemed to be members of the association. 47 C.F.R §69.601(b). A person or entity that, on or after enactment, is a successor or assignee of a NECA member is also an incumbent LEC.

17/ *See* 47 U.S.C. § 251(c)(2).

18/ 47 U.S.C. § 251(i), TCA, at § 101.

19/ *See* Conference Report, at 123.

even to mention Section 251(i) or the legislative history. Furthermore, the provision of the TCA upon which Bell Atlantic and PacTel do rely, Section 251(d)(3)(A), supports the contrary proposition. Section 251(d), taken as a whole, lends support to the interpretation that the TCA does not limit the FCC's exclusive jurisdiction over LEC-to-CMRS interconnection.

Section 251(d) directs the FCC to complete a rulemaking to implement the TCA's interconnection provisions. With regard to state interconnection regulations, Section 251(d)(3) provides that the Commission may not preclude certain state commission actions and establishes a three-pronged test for preemption. Section 251(d)(3) arguably expands the Commission's jurisdiction with regard to interconnection because its three-pronged standard for FCC preclusion of state regulation is much looser than *Louisiana PSC*'s preemption standard.

Under *Louisiana PSC*, the FCC may not preempt state regulation if: (i) it is possible to separate the intrastate and interstate portions of the service; and (ii) the state regulation is consistent with the federal purpose.[20/] Unlike *Louisiana PSC*, however, Section 251(d)(3) does not require a finding that the Commission determine it impossible to separate the interstate and intrastate portions of telecommunications in order for the Commission to preempt state regulation. Rather, the three-pronged preemption test under Section 251(d)(3) provides that:

> the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that: (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; *and* (C) does not substantially prevent implementation of the requirements of [Section 251] and the purposes of [the competitive markets section of the TCA].[21/]

Section 251(d)(3) thus means that the FCC may not preempt a state when the state regulation meets *all three prongs* of the test. The logical corollary of the preemption test enunciated under Section 251(d)(3), however, is that the Commission *may* preclude enforcement of any state regulation, order or policy that *either*: (i) does not involve access and interconnection obligations of local exchange carriers; *or* (ii) is not consistent with the requirements of Section 251 or substantially prevents implementation of Section 251; *or* (iii) does substantially prevent implementation of the purposes of Section 251 or the competitive markets section of the TCA. While the two-pronged *Louisiana PSC* test requires the FCC to show both inseverability of intrastate and interstate matters *and* state frustration of a federal purpose to justify preemption, therefore, Section 251(d)(3) shifts the

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20/ *See* 476 U.S. at 372-376.

21/ *See* 47 U.S.C. § 251(d)(3), TCA, § 101 (emphasis added).

burden to authorize the FCC to preempt any state regulation that fails to meet any single prong of the three-part statutory test.

The TCA, moreover, preserves the Budget Act's expansion of the FCC's jurisdiction with regard to CMRS providers. Section 253 of the TCA authorizes the FCC to preempt state regulations that impose barriers to entry by telecommunications carriers. *See* 47 U.S.C. § 253. Section 253(e) provides, however, that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers." Section 332(c)(3) prohibits states from regulating rates and entry with respect to CMRS providers and gives the Commission exclusive authority to determine whether a state petition to regain rate or entry regulation authority has met the statutorily required showing.[22/] Accordingly, Section 253(e) provides that the Commission's exclusive authority over CMRS interconnection and state petitions to regain authority to regulate CMRS is unaffected by the enactment of the TCA. Moreover, any contrary conclusion would be inconsistent with both the intent of the Budget Act — to free CMRS from a state-by-state substantive regulatory process and the TCA — which confirms that states may not maintain barriers to competitive entry.

Finally, the Bell Atlantic/PacTel *Ex Parte* also fails to consider the TCA's treatment of wireless carriers under the provisions governing Bell Operating Company ("BOC") entry into interLATA markets. Section 271(c)(1) of the TCA requires that a BOC demonstrate that it has entered into at least one interconnection agreement with a "facilities-based competitor" as a competitive precondition to its entry into interLATA markets. Section 271(c)(1) also specifically provides that an interconnection agreement with a cellular carrier is not a sufficient predicate for BOC interLATA entry authority. Given that Congress thus considers cellular service to be in an entirely different competitive market from landline local exchange service (which is plainly reflected in both the Budget Act and the

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22/ The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. Section 332(c)(3)(A) grants the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that such non-competitive market conditions exist and CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State." 47 U.S.C § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. *See* 47 C.F.R. §20.13, State Petitions for authority to regulate rates. Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary." 47 U.S.C. § 332 (c)(3)(A). In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

TCA), the TCA cannot "expressly strip" the Commission of authority over LEC-to-CMRS interconnection as the Bell Atlantic/PacTel *Ex Parte* asserts.

III. CONCLUSION

The provisions of the TCA support the conclusion that the FCC has exclusive jurisdiction over all LEC-to-CMRS interconnection rates and traffic.[23/] The interconnection provisions of Section 251, in conjunction with the "savings clause" in Section 251(i), explicitly state that the FCC's authority to establish requirements for LECs to provide reciprocal compensation is in addition to authority it already possesses under Section 201(a) of the Communications Act of 1934. Contrary to the Bell Atlantic/PacTel *Ex Parte*, moreover, Section 251(d)(3) expands rather than limits the Commission's authority with regard to interconnection by loosening the *Louisiana PSC* preemption test. Furthermore, the preemption provisions regarding state barriers to entry by telecommunications service providers contained in Section 253 are consistent with the Budget Act's elimination of state rate and entry regulation over CMRS providers. The exclusion of cellular service as a predicate to BOC interLATA entry authority under Section 271(c)(1) of the TCA further supports the conclusion that the TCA does not alter the Commission's exclusive jurisdiction over CMRS and LEC-to-CMRS interconnection under the Budget Act or its ability to establish an interim bill-and-keep mutual compensation policy.

23/ The pricing standards set forth in Section 252(d) are applicable only to the process of state approval of interconnection agreements, and in no way limit the Commission's authority under the Budget Act regarding LEC-to-CMRS interconnection.

ATTACHMENT

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October 16, 1995

VIA HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

EX PARTE

Re: Docket CC No. 94-54

Dear Mr. Caton:

Please find attached a Memorandum and duplicate copies submitted by Cox Enterprises examining the scope of the FCC's jurisdiction over rates and terms of interconnection between CMRS providers and LECs.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

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October 16, 1995

MEMORANDUM

This memorandum examines the scope of the Federal Communications Commission's ("Commission") jurisdiction over the rates and terms of interconnection between commercial mobile radio service ("CMRS") providers and local exchange carriers ("LECs"). Cox demonstrates that because of changes to the Commission's jurisdiction over CMRS under the 1993 Budget Act, the Commission has exclusive rate jurisdiction over CMRS, including rates associated with both interstate and intrastate CMRS interconnection between LECs and CMRS providers. Accordingly, there is no need for the Commission to preempt the states to order the payment of mutual compensation for the termination of traffic on the respective LEC and CMRS networks.

I. BACKGROUND

The Communications Act contains a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[1] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission jurisdiction "with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications . . . ."[2] As the Commission has sought effective means to deregulate communications equipment or introduce new communications services into the market it has occasionally preempted states with inconsistent policies. In cases where the Commission has overstepped its jurisdictional boundary, courts have reversed the Commission.[3]

The Commission's jurisdiction over communications provided by mobile radio is entirely different from the Commission's jurisdiction over landline communications. The Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") fundamentally realigned the

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[1] *See* 47 U.S.C. § 152(a).

[2] *See* 47 U.S.C. § 152(b).

[3] *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("Louisiana PSC"); *see also California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

balance of federal/state jurisdiction over CMRS. In the Budget Act Congress amended Section 2(b) and Section 332 and reclassified all existing mobile services as either CMRS or private mobile radio services ("PMRS").[4] One of the main purposes of the Budget Act was to foster the nationwide growth of wireless telecommunications by establishing a uniform federal regulatory framework for all mobile services.

Amended Sections 332 and 2(b) rewrote the traditional boundaries of jurisdiction over mobile services. The states no longer enjoy rate and entry regulation authority over CMRS providers.[5] Rather, their authority is limited to overseeing the "terms and conditions" of CMRS and PMRS services provided to end users. The Budget Act thus eliminated state substantive jurisdiction over wireless common carrier services. Substantive regulation of CMRS has become federalized and, because jurisdiction over CMRS is no longer divided, authority over CMRS interconnection is no longer jurisdictionally split.

Arguing that amended Sections 332 and 2(b) expressly preempts state authority over intrastate CMRS rates but does not expressly authorize the Commission to regulate intrastate CMRS rates, some have suggested that Congress may have created a "jurisdictional void" under which neither the Federal government nor the states has regulatory authority over the formerly intrastate CMRS rates.[6] As demonstrated in this memo, this theory is contrary to the plain language and legislative history of the Budget Act. Commission adoption of this jurisdictional void theory would nullify the Budget Act and Congress's intent that Commission direct the evolution of wireless networks on a nationwide basis.

II. Commission Jurisdiction Over CMRS to LEC Interconnection Is Consistent With the Plain Meaning and Legislative History of Amended Sections 332 and 2(b).

Review of the Budget Act and its legislative history confirms the FCC's sole authority over CMRS to LEC interconnection. The Budget Act expands the Commission's jurisdiction to occupy the field, rather than maintaining prior limits on or restricting the Commission's jurisdiction over intrastate rates for mobile services.[7] Accordingly, the

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[4] *See* 47 U.S.C. § 332(d).

[5] *See* 47 U.S.C. § 332(c)(3). As discussed below, the Budget Act provides that states can petition the FCC for authority to reestablish substantive regulation over CMRS providers if they can demonstrate that CMRS has become a substitute for traditional landline telephone service for a substantial portion of the public within the state.

[6] *See* Cellular Resellers Association Petition for Reconsideration, in PR Docket No. 94-105 at 6 (filed June 19, 1995).

[7] *See* McCaw Cellular Communications, Inc., Reply Comments, in PR Docket No. 94-105 (continued...)

Commission need not preempt to regulate the entire interconnection arrangement between a LEC and CMRS provider; such preemption has already occurred by statute.

1. Section 2(b). The Budget Act places intrastate CMRS interconnection rates under the Commission's exclusive jurisdiction by its amendments to Section 332(c) and 2(b) of the Act. Section 2(a) gives the Commission exclusive jurisdiction over all interstate telecommunications.[8] Section 2(b) "fences off"[9] from Commission jurisdiction all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[10] Under the Supreme Court's interpretation of Section 2(b) in the pre-Budget Act *Louisiana PSC* decision, the Commission is denied jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy.[11]

The Budget Act, however, amended Sections 332(c) and 2(b) and supersedes *Louisiana PSC* with regard to state jurisdiction over intrastate CMRS. The Commission in *Louisiana PSC* argued that it had authority under Section 220 of the Act to preempt state depreciation regulations. In rejecting this argument, the Court noted that the main clause in Section 2(b) — ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications — is itself a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [Section] 220."[12]

Congress amended the initial clause introducing Section 2(b) as a *direct limitation* on the main clause of Section 2(b), which *Louisiana PSC* termed a "rule of statutory construction." The adverbial clause limiting the main clause of Section 2(b), as most recently amended by the Budget Act, provides:

> *Except as provided in sections 223 through 227 of this title, inclusive, and Section 332* . . . , nothing in this chapter

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(...continued)
(filed March 3, 1995) ("McCaw Reply Comments").

[8]*See* 47 U.S.C. § 152(a).

[9]*See Louisiana PSC*, 476 U.S. 370.

[10]*See* 47 U.S.C. § 152(b).

[11]*See Louisiana PSC*, 476 U.S. 372-376.

[12]*See Louisiana PSC*, 476 U.S. at 373, 376-7 n.5.

> shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].[13]

As shown below, Section 332 grants the Commission sole authority over *all* CMRS rates and entry issues. Accordingly, the plain language of Sections 2(b) and 332 of the Act, as amended by the Budget Act, reserves exclusive jurisdiction over all substantive regulation of CMRS to the Commission, without regard to their former characterization as intrastate. Stated differently, Section 2(b)'s reservation of jurisdictional authority over wireless intrastate common carrier telecommunications to the states, discussed in *Louisiana PSC*, has been eliminated.[14] The Supreme Court found in *Louisiana PSC* that the Commission's decision to override Section 2(b) had no legal foundation. It also observed, however, that Congress could provide a foundation.[15] In enacting the Budget Act in 1993, Congress did precisely what the *Louisiana PSC* found lacking in 1986 — Congress specifically delegated authority to the Commission to regulate CMRS.

Congress has amended Section 2(b) in similar circumstances to remove state jurisdiction where it was necessary or appropriate to advance a federal purpose. In restricting Section 2(b) in 1978 to except amendments to the pole attachment provisions in Section 224 of the Act, Congress stated that the amendment:

> modifies existing [S]ection 2(b) . . . which limits the jurisdiction of the Commission over connecting carriers to [S]ections 201 through 205 of . . . the [A]ct. Since [the amended pole attachment provision] would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 [A]ct . . . , a conflict arises between the limitation on the Commission's jurisdiction of [S]ection 2(b) and its duty to regulate under proposed new [S]ection 224 . . . . [The amendment to Section 2(b)] removes this conflict by removing the jurisdictional limitations of [S]ection 2(b) as they would otherwise apply to proposed [S]ection 224.[16]

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[13] *See* 47 U.S.C. § 152(b) (1995) (emphasis added).

[14] *See, e.g.*, McCaw Reply Comments, at 5-6; GTE Service Corporation *Ex Parte* letter to William Caton from Carol Bjelland filed in PR Docket No. 94-105 on March 3, 1995 at 1 ("GTE *Ex Parte*").

[15] *See id.*, 476 U.S. at 373-4.

[16] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N.

(continued...)

Similarly, when Congress enacted the telephone relay service ("TRS") provisions by adding new Section 225 to the Communications Act (as part of the Americans with Disabilities Act of 1990) and the telemarketing fraud provisions by adding new Section 228 to the Communications Act (in the Telephone Consumer Protection Act of 1991), a reference to these provisions was included in Section 2(b) to remove any limitations on the Commission's jurisdiction over the substantive provision's subject matter.[17]

By amending Section 2(b) to associate Section 332 with the provisions of the Act governing pole attachments, TRS requirements, and telemarketing, Section 332 read in conjunction with Section 2(b) vests the Commission with jurisdiction over CMRS. This conclusion is compelled because the adverbial clause in Section 2(b) regarding the Act's pole attachments, TRS, telemarketing and CMRS provisions nullifies the Court's direction in *Louisiana PSC* that the main clause of Section 2(b) be a "rule of statutory construction" specifying that no other provisions of the Act be construed to give the Commission jurisdiction over intrastate telecommunications.

2. Section 332. Section 2(b), as amended, dictates that the substantive provisions of Section 332 will determine the extent of the Commission's jurisdiction over CMRS. Section 332, in turn, as amended by the Budget Act, grants the Commission sole authority to regulate all interstate and "intrastate" rate and entry aspects of CMRS. In other words, Section 332 has so "federalized" CMRS services that the notion of an "intrastate" or "local" portion of the service has no effect on the Commission's jurisdiction.[18] A reading of

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(...continued)
109, 134.

[17] *See* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, Title IV, § 401(a), reprinted in 1990 U.S.C.C.A.N. 104 Stat. 327, 366-369 (1990); Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, reprinted in 1991 U.S.C.C.A.N. 105 Stat. 2394 (1991); Statement of President Upon Signing TCPA, *reprinted in* 1991 U.S.C.C.A.N. 1979 (the President stated that he "signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices . . . . [and] [the] flexibility to adapt its rules to changing market conditions.").

[18] In the *Land Mobile Services* docket, for example, the Commission exercised exclusive jurisdiction over specialized mobile radio ("SMR") systems finding that wireless SMRs operate "without regard to state boundaries or varying local jurisdictions" and on a "nation-wide basis." *See An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Memorandum Opinion and Order*, Docket No.18262, 51 F.C.C.2d 945, 972-3 (1975) ("*Land Mobile Services*"), *aff'd sub nom., National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 646-7 (D.C. Cir. 1976) ("*NARUC*"). In 1982, Congress codified the Commission's finding in *Land Mobile Services* by amending Section 301 of the Act to "make clear that the Commission's jurisdiction over radio communications extends to intrastate as well as interstate transmissions" of all private land mobile radio services ("PLMRS"). *See* H. Rep. No. 97-

(continued...)